

UNITED STATES DISTRICT COURT  
THE SOUTHERN DISTRICT OF NEW YORK

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FREE SPEECH, by its member Greg Ruggiero; :  
STEAL THIS RADIO; DJ THOMAS PAINE; DJ CARLOS :  
RISING; DJ SHARIN; DJ E.S.E.; FRANK MORALES; :  
and JOAN MUSSEY, :  
: 98 Civ. 2680 (MBM)

Plaintiffs,

- against -

JANET RENO, as Attorney General of the :  
United States; UNITED STATES DEPARTMENT OF :  
JUSTICE; and the FEDERAL COMMUNICATIONS :  
COMMISSION, :  
:

Defendants.

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( STATE OF NEW YORK )  
( COUNTY OF NEW YORK )

**ERROL MAITLAND,** being duly sworn, deposes and says:

1. I am the producer for Wake Up Call, a local morning drive-time program broadcast from 6 a.m. to 9 a.m. on WBAI Pacifica Radio in New York. I am also the technical director for Democracy Now, a national news magazine program that is aired on over 23 stations from Hawaii to Maine. Democracy Now is broadcast on weekdays from 9 a.m. to 10 a.m. EST on WBAI Radio. I have 18 years of media experience, and have worked as a news reporter, broadcaster, and producer for both television and radio. I have worked at WBAI radio for the past five years. A copy of my resume is attached to this affidavit as Exhibit A. I submit this affidavit in support of plaintiffs' motion for a preliminary injunction in the above-captioned case.

2. WBAI Pacifica Radio is the flagship station of a network of five radio stations across the country. The five Pacifica stations are among a small group of radio stations throughout the country dedicated to community programming. All told, less than 150 of the nation's 12,000 or more stations could be called community radio stations.

3. In New York City, WBAI Pacifica Radio has approximately 200,000 listeners. One of WBAI Radio's missions is to address issues of concern to communities in New York City and across the country. While New York is one of the largest radio markets in the country, seldom is there a station that provides programs for communities on any continuing basis. WBAI Radio serves this function, but the station cannot address all of the issues affect the various and diverse communities in the metropolitan area given time and resource constraints. Attached as Exhibit B to this affidavit is a copy of WBAI's program grid.

4. In general, radio program content in New York City consists of top 40 pop/rock music, classical music, religious programming, and a significant amount of mainstream, conservative talk radio, e.g., Rush Limbaugh, Bob Grant, and Jay Diamond. Very few stations provide program content that is aimed at, or of interest to, the African American, Latino, Counter-culture or Gay and Lesbian communities. Even niche programs of local college stations are tightly controlled and seldom do they serve the needs of the communities in which they are located. Attached hereto as Exhibit C is a chart delineating the top 50 radio stations in New York City and their program content.

5. Based on my experience as a public access television producer, I have found that one can find a wider range of voices and programming where there is public access to the broadcast medium. Local community issues, from land use to local school board issues, are aired only in these public fora. On public access stations, there is a far richer array of programming for and from diverse groups, that is not duplicated on the radio dial.

6. In fact, broadcast radio today does not address people's civic lives at all. Stations like Steal This Radio help to fill this very large gap by providing a community forum, much like the town hall at the turn of the century. Indeed, Steal This Radio, like other microradio stations, gives listeners an opportunity to be heard and provides them with a sense of connection to the community. See Overcoming Myths and barriers: An In-depth Look At NPR's African American Listeners, at 21 (1997).

7. For example, Steal This Radio airs listener participation programs that discuss important community issues such as police misconduct, workplace rights, housing rights, public education, and environmental degradation and revitalization.

8. The increasing commercialization of radio, and its attendant failure to address local and community issues, has engendered a system which has continually failed minorities as both speakers and listeners, especially minorities in New York City.
9. Minority broadcast ownership in the United States today remains extremely low in comparison to the minority population and non-minority ownership totals. Consequently, low power radio provides an outlet for airing local and diverse issues important to those segments of the population left unserved by the current regulatory scheme.
10. Radio was initially viewed by all as a public, democratic medium. In May 1922, the premiere issue of Radio Broadcast heralded radio as "the people's university," a public resource that would make government "a living thing to its citizens." In the wake of the first scheduled and advertised broadcasts -- including coverage of presidential elections and addresses -- more than 400 stations arose around the country, largely run by public, civic and religious organizations. See Michael Carpini, "Radio's Political Past" in *Radio--The Forgotten Medium* at 22 (1995). None of these stations sold air time for any purpose.
11. In the 1920's and 1930's, however, radio shifted from a medium dominated by public interests to one dominated by private interests. This shift was inexorable, as commercialization made it increasingly difficult for nonprofit stations to compete for talent and audiences. Commercial stations, bolstered by profits and corporate sponsorship, literally began to drown out public stations with their more powerful transmitters. In addition, government policies worked to the disadvantage of noncommercial stations, which were then viewed as "less public" than "toll" stations, which were theoretically available to anyone willing (and able) to pay for air time. Commercial stations were also granted "clear channel" frequencies (ensuring interference-free signals and allowing the use of powerful transmitters) while educational stations were given "local" frequencies with severe power restrictions and limited broadcast hours. *Id.* at 23. Noncommercial stations were unable to compete in this environment.
12. Since the inception of commercial radio, the total number of commercial stations has continued to climb steadily, more than doubling during the period from 1960 to 1992. At present, the Federal Communications Commission, Office of Public Affairs estimates that there are more than 11,475 commercial stations in the country.
13. While the number of commercial stations continues to rise, minority broadcast ownership totals continue to decline. According to the Minority Telecommunications Development Program ("MTDP") of the National Telecommunications and Information Administration ("NTIA"), which began collecting data on Black, Hispanic, Asian, and Native American ownership of commercial radio stations in 1990, minority ownership totals have remained consistently low, and in fact, have never exceeded 2.9 percent. See Minority Telecommunications Development Program, "Minority Commercial Broadcast Ownership in the United States" at 1 (August 1997). A copy the Minority Ownership Report is attached hereto as Exhibit D.
14. Moreover, the MTDP's most recent survey found that minority ownership has decreased significantly over the last year; by the third quarter of 1997, minorities owned thirty fewer stations than the previous year for a total of 322 stations. *Id.* at 7, 11. Two charts published by the MTDP which analyze Black ownership of commercial radio stations in the United States for the last five years, and list current broadcast station owners is attached hereto as Exhibit E.
15. The significance of these figures becomes apparent when one notes that recent U.S. Bureau of the Census data indicate that minorities comprise more than 28 percent of the total resident U.S. population (African Americans represent 12.7 percent; Native Americans represent 0.9 percent; Asian Americans and Pacific Islanders represent 3.8 percent; and Hispanic Americans of any race represent 10.9 percent of the population). Yet as already noted, they own less than 3 percent of all commercial radio stations.
16. Research by the MTDP indicates that this under-representation is due, in significant part, to the lack of access to investment capital, and the lack of policies and incentives designed to promote minority ownership in the telecommunications industry. Indeed, the MTDP Report concludes that there are now fewer policy initiatives and incentive programs than there were in 1990.
17. According to the MTDP, the decline in minority ownership is directly attributable to broadcasting industry changes and government policies:  
[C]hanges in industry policies and government regulations have increased station prices, reduced ownership diversity, increased the challenges faced by minority commercial station owners in competing for advertising revenues, rescinded key incentive-based programs designed to encourage minority ownership in commercial broadcasting, and increased concentration of media ownership. Andrea Adelson, *Minority Voice Fading For Broadcast Owners*, N.Y. Times, May 19, 1997, at D9.

#### **Minority Ownership at 1.**

18. Perhaps the most significant change in radio broadcasting came about with the issuance of new rules relaxing the national ownership caps. Prior to September 1992, the FCC allowed an individual or entity to own a maximum of 12 AM

and 12 FM stations. The Commission also permitted a single owner to own up to 14 stations in each service if at least two of the stations were minority controlled. On September 16, 1992, the national commercial radio ownership limits were increased to 18 AM stations and 18 FM stations. Then, on September 16, 1994, the national ownership limits increased to 20 AM and 20 FM stations. See Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 7 FCC 6387 ¶¶ 6, 9, 14.

19. Since 1992, the industry has witnessed an even greater consolidation of ownership interests in radio stations among media conglomerates and group owners. See Federal Communications Commission, Mass Media Bureau, Radio Station Ownership, at 10, 11 (Oct., 1994). For example, three of the top ten radio groups -- Chancellor, Gulfstar, and Capstar -- are controlled by a single private investment firm, Hicks, Muse, Tate & Furst Inc. Hicks, Muse now owns over 400 stations, and has expressed an interest in expanding its reach to 600 stations. Columbia Broadcasting Systems, Inc. alone owns six of the top 25 stations in New York City.

20. One year after passage of the Telecommunications Act of 1996 (the "Act"), national ownership by the top 50 radio groups increased from 876 stations in 1995 to 1435 stations in 1996. Kofi Ofori and Karen Edwards, Blackout! Media Ownership Concentration and the Future of Black Radio, at \_\_\_ (Section VI/E) (1997). The consolidation has continued from 1996 through the present. In the last two years, the number of radio station owners has decreased from 5222 to 4499, a drop of more than 15 percent.

21. Large group owners have significant control over the local media marketplace and an advantage in dictating the terms for advertising. The Research Group, Duopoly 1995: Lessons Learned For The Future, at T-25 and T-65 (Seattle, 1995).

22. This kind of control by large owners will make it increasingly difficult for minority-owned stations to compete in the marketplace, and will, in turn, both drive minorities out of broadcast ownership and preclude new minority owners from entering the industry, as has already happened. In this regard, the MTDP Report notes that, on average, minorities own broadcast properties with technical characteristics (frequency band and signal power) inferior to those of non-minority owners, and thus reach fewer listeners, generate less advertising revenue, and appear to serve a less affluent segment of the community. National Telecommunications and Information Administration, the U.S. Department of Commerce, "Minority Broadcast Ownership In The United States", at ii (April 1996). Given these inhibiting factors, the likelihood that the few existing minority stations will be able to compete with large group owners seems slim at best.

23. Furthermore, in 1995, Congress repealed the minority tax certificate program that provided tax benefits to the seller of a media property who sold to a minority investor. Concomitantly, the Supreme Court ruled in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), that race-based preferences awarded by the federal government are subject to a standard of strict scrutiny, thereby creating an additional barrier to designing government incentive programs that seek to address discrimination based on race.

24. Before these programs, there were less than a handful of minority-owned stations.

25. Finally, the passage of the Telecommunications Act of 1996, by means of deregulation, significantly increased competition in commercial broadcasting and drove station prices to their highest levels to date. Elizabeth Rathburn, \$8 Billion Loose In Station Market; Radio and Television Station Trading in 1995; Includes List of Top Ten Mergers in 1995, *Broadcasting And Cable*, March 11, 1996, at 40. Thus, under the Act, a single company can have radio holdings in a market that are substantial enough to result in its control of up to 40 percent of the advertising revenue in that market. Thus, "minority owners will face increasing difficulty in generating revenues that are sufficient to maintain viable businesses in markets where one company exercises this kind of control." Minority Ownership at 4. The ability to own multiple stations in the same market gives a significant competitive advantage to group owners -- who are more likely to be non-minority and have greater financial resources -- and has proven to be an effective tool for obtaining market share while increasing economies of scale. The new ownership rules thus may create even greater economic possibilities for the handful of companies that were already generating high streams of advertising revenues, and even more significantly, may squeeze out smaller stations in weaker markets. These conditions create additional barriers to the entry of minority broadcasters into the market.

26. Further consolidation in the ownership or joint operations in the future will continue to reduce the number of separately owned voices that service the radio audience, ultimately decreasing even more the diversity of program choices offered to minority listeners. Today, a few public networks such as National Public Radio and Pacifica provide some alternative views on the news of the day, as do two African American-oriented networks, Sheridan and the National Black Network, and one Latino network, Caballero. However, these limited venues do not -- and indeed cannot -- make up for the lack of viewpoint diversity, and program diversity on commercial stations post-consolidation.

27. Given the economic barriers to market entrance or station acquisition, see Lawrence Solely and George Hough III, "Black Ownership of Commercial Radio Stations: An Economic Evaluation," *Journal of Broadcasting*, 456-463 (Fall 1978), it is hardly surprising that minorities now own only 322 commercial broadcast stations, representing merely 2.8 percent of total commercial ownership.

28. African American ownership currently represents 1.7 percent of the total commercial radio ownership and Hispanic ownership represents 1.05 percent of the total commercial stations. Minority Ownership at 7-8. During 1997, a total of 98 Black owners controlled 193 radio and television stations. Id. at 8.

29. Minorities have fared no better in the public broadcasting arena. Out of 627 public radio stations that receive funding from the Corporation for Public Broadcasting, there are only 66 stations with a sizable African American audience broadcasting regularly. See Annette Walker, *Causing Static: Budget Cuts Turn Down The Volume on Black Public Radio Stations*, National Association of Black Journalists Journal at 6-7 (Spring/Summer 1998), attached hereto as Exhibit F. Clearly, public radio does not currently serve the needs of a very active African American listening community. Indeed, NPR has played a mixed role at best in supporting the gains made by African Americans in public broadcasting.

30. While this severe under-representation clearly bears a direct relationship to the lack of access to investment capital and the lack of legislation and policy initiatives promoting minority ownership, the disparity also reflects the long history of racial discrimination in radio programming and hiring. See Clint C. Wilson II and Felix Gutierrez, *Minorities and Media: Diversity and the End of Mass Communication*, at 202-205 (1985).

31. Minority broadcast ownership and programming are desirable because they enhance diversity of viewpoint; minority owners and programmers are more likely to provide news, information, and entertainment programs that serve the overall interests of minority audiences. See Jeffrey Dubin and Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, R 19 (Division of Humanities and Social Science, California Institute of Technology, Social Science Working Paper 856 (July 1993)).

32. Diversity of ownership and programming provides for multi-cultural expression and awareness, and helps bring focus to issues of particular importance to individual communities. In this regard, local low power radio serves a critical function for those disenfranchised by the current regulatory scheme.

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Errol Maitland

Sworn to before me this  
13th day of July, 1998

Notary Public